

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FRANK GREEN,

Plaintiff,

No. 2:23-cv-1066 KJN P

ORDER

v.

DR. MOHYUDDIN,

Defendant.

Plaintiff Frank Green brought this action as a state prisoner, proceeding pro se and in forma pauperis. For the reasons stated herein, plaintiff's children, Kemmica¹ Green and Jonathan Green, are granted until March 28, 2024 to file a motion for substitution.

Background

On December 29, 2023, defendant filed an amended notice of plaintiff Frank Green's death. (ECF No. 23.) The amended notice of death stated that plaintiff was survived by his two children, Kemmica Green and Jonathan Green. (Id.) On December 11, 2023, defendant served plaintiff's son, Jonathan Green, with the amended notice of death. (Id.) Despite reasonable attempts, defendant was unable to serve plaintiff's daughter, Kemmica Green, with the amended notice of death. (Id.)

¹ In the letter to the Clerk of the Court, filed February 5, 2024, Ms. Green provides the correct spelling of her first name.

1 On February 5, 2024, Kemmica Green and Jonathan Green filed a letter addressed to the
2 Clerk of the Court, docketed as “Notice of Substitution.” (ECF No. 24.) This letter requests that
3 the instant action be “transferred” to Kemmica Green and Jonathan Green. (Id.) This letter
4 requests that Kemmica Green and Jonathan Green be granted access to all pleadings related to the
5 instant action. (Id.)

6 Discussion

7 Rule 25(a)(1) of the Federal Rules of Civil Procedure provides:

8 If a party dies and the claim is not extinguished, the court may order
9 substitution of the proper party. A motion for substitution may be
10 made by any party or by the decedent’s successor or representative.
11 If the motion is not made within 90 days after service of a statement
12 noting the death, the action by or against the decedent must be
13 dismissed.

14 If the requirements of Rule 25(a)(1) are met, “[t]he substituted party steps into the same
15 position as [the] original party.” Hilao v. Estate of Marcos, 103 F.3d 762, 766 (9th Cir. 1996).

16 The party seeking substitution in a survival action shoulders the burden of demonstrating
17 that a particular state’s law authorizes a survival action and that the party meets that state’s
18 requirements for bringing the action. Hayes v. County of San Diego, 736 F.3d 1223, 1228-29
19 (9th Cir. 2013).

20 California permits pending proceedings to survive a plaintiff’s death if the underlying
21 cause of action survives. Cal. Code Civ. Proc. § 377.21. In California, “a cause of action for or
22 against a person is not lost by reason of the person’s death but survives subject to the applicable
23 limitations period.” Cal. Code Civ. Proc. § 377.20. Accordingly, since the forum state is
24 California and the claims presented fall under § 1983, plaintiff’s death did not extinguish the
25 action. Scalia v. Count of Kern, 2024 WL 664456, at *1 (E.D. Cal. Feb. 16, 2024) (citing
26 Gutierrez v. Tucker, 2021 WL 5263847, at *2 (E.D. Cal. Apr. 20, 2021)).

27 In California, an action that survives the death of a party entitled to bring the action passes
28 to decedent’s successor in interest, subject to California’s Probate Code. Cal. Code. Civ. Proc. §
29 377.30. An action may be initiated by a decedent’s personal representative or, if there is no
30 personal representative, by the decedent’s successor in interest. Id.

1 Accordingly, if “there is no personal representative for the decedent’s
 2 ‘successor in interest’ may prosecute the survival action.” Tatum v. City & Cnty. of San
 3 Francisco, 441 F.3d 1090, 1093 n.2 (9th Cir. 2006) (citing Cal. Code Civ. Proc. §§ 377.20, .32.)
 4 A decedent’s ““personal representative’ is the person or firm appointed by the probate court to
 5 administer the probate of a decedent’s estate.” Cotta v. County of Kings, 79 F. Supp.3d 1148,
 6 1158 (E.D. Cal. 2015) (quoting Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel &
 7 Pastore, 162 Cal.App.4th 1331, 1340 (2008)). A decedent’s “successor in interest” is “the
 8 beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of
 9 action or to a particular item of the property that is the subject of a cause of action.” Cal. Code
 10 Civ. Proc. § 377.11. California’s probate code mandates that an entire intestate estate passes to
 11 the decedent’s issue if there is no surviving spouse. Cal. Prob. Code § 6402(a).

12 In addition, California’s Code of Civil Procedure provides that:

- 13 (a) The person who seeks to commence an action or proceeding or to
 continue a pending action or proceeding as the decedent’s successor
 in interest under this article, shall execute and file an affidavit or a
 declaration under penalty of perjury under the laws of this state
 stating all of the following:
 - 16 (1) The decedent’s name.
 - 17 (2) The date and place of the decedent’s death.
 - 18 (3) “No proceeding is now pending in California for administration
 of the decedent’s estate.”
 - 19 (4) If the decedent’s estate was administered, a copy of the final order
 showing the distribution of the decedent’s cause of action to the
 successor in interest.
 - 22 (5) Either of the following, as appropriate, with facts in support
 thereof:
 - 23 (A) “The affiant or declarant is the decedent’s successor in interest
 (as defined in Section 377.11 of the California Code of Civil
 Procedure) and succeeds to the decedent’s interest in the action or
 proceeding.”
 - 26 (B) “The affiant or declarant is authorized to act on behalf of the
 decedent’s successor in interest (as defined in Section 377.11 of the
 California Code of Civil Procedure) with respect to the decedent’s
 interest in the action or proceeding.”
 - 28 (6) “No other person has a superior right to commence the action or

1 proceeding or to be substituted for the decedent in the pending action
2 or proceeding.”

3 (7) “The affiant or declarant affirms or declares under penalty of
4 perjury under the laws of the State of California that the foregoing is
true and correct.”

5 (b) Where more than one person executes the affidavit or declaration
6 under this section, the statements required by subdivision (a) shall be
modified as appropriate to reflect that fact.

7 (c) A certified copy of the decedent’s death certificate shall be
attached to the affidavit or declaration.

8 Cal. Civ. Proc. Code § 377.32.

9 Kemmica Green and Jonathan Green are granted until March 28, 2024 to file a motion for
10 substitution, including a declaration required under California Civil Procedure Code § 377.32, as
11 well as a certified copy of plaintiff’s death certificate. Once the court receives these documents, a
12 ruling will issue on the motion for substitution.

13 Kemmica Green and Jonathan Green are informed that the docket for the instant action
14 may be accessed on PACER. Information regarding how to access PACER is available on the
15 court’s web page. In addition, the Clerk’s Office will provide copies of documents and of the
16 docket sheet at \$0.50 per page. Checks in the exact amount are made payable to "Clerk, USDC."
17 Copies of documents in cases may also be obtained by printing from the public terminals at the
18 Clerk’s Office or by contacting Cal Legal Support Group at: 3104 "O" Street, Suite 291,
19 Sacramento, CA 95816, phone 916-441-4396, fax 916-400-4948.

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. Kemmica Green and Jonathan Green are granted until March 28, 2024 to file a motion
22 for substitution; and
- 23 2. The Clerk of the Court shall serve this order on Kemmica Green, 5033 Ivy Wood
24 Lane, #932, Fort Worth, Texas, 76115; and on Jonathan Green, 2319 Jefferson
25 Avenue, Berkeley, CA, 94703.

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1 Dated: February 23, 2024
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Carolyn K. Delaney

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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